No. 15,078

IN THE

United States Court of Appeals

For the Ninth Circuit

CRISTOBAL C. HINES,
Appellant,

vs.

JOAQUIN A. PEREZ,
Appellee.

On Appeal from the District Court of Guam for the Unincorporated Territory of Guam.

APPELLANT'S CLOSING BRIEF.

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APPELLANT'S CLOSING BRIEF.

I. APPELLEE NEITHER BREACHED NOR FRUSTRATED THE CONTRACT BETWEEN THE PARTIES.

The appellee states that the only question presented by the contract was and is the value of the shares sold by the appellee to the appellant (Appellee's Brief, page 1). The appellant admits that. But, the appellant submits that the main point of the suit is the manner at which the share value was arrived.

The contract was a conditional one. It recited certain conditions; among them were the provisions for the computation of accounts receivable and the value of the various properties of the corporation. The

appellant promised to pay for the shares what the shares were worth, if their value was arrived at by a certain method. If this method was not followed, the condition would be unfulfilled and the contract not operative.

Peterson v. Montgomery Holding Co., 89 Cal. App. 2d 890, 202 P. 2d 365.

Appellee has contended that appellant "frustrated" the performance of the contract in two particulars: (a) writing off bad debts and (b) length of time for completion of audit.

It is submitted that neither of these contentions have any validity although both are of an extremely minor nature and would not in any way be proof of the appellee's contention, even if true. Appellant's accountant, Viray, followed a procedure which is common in verification of most corporation audits, of verifying the accounts receivable prior to fixing their value. There is no testimony that this was not in accordance with the standards set up by the American Society of Accountants and as a matter of fact, as is within the judicial knowledge of this Court, is standard practice.

Appellant's accountant took a considerably longer period to complete his audit than did appellee's. As previously pointed out, however, the books of the corporation were in a completely chaotic state, and there was necessity on the part of Viray, appellant's accountant, to reconstruct them prior to submitting his report. The same was not true of Kaneshiro, appellee's accountant, who had set up the system.

It is indeed difficult to see how these two minor points could, as stated by appellee, "answer all arguments advanced by appellant."

II. APPELLEE COULD NOT PREVAIL IN HIS SUIT IN THE ABSENCE OF A BREACH OF CONTRACT.

After appellee vigorously argues that appellant breached and frustrated the contract he advances as a complete refutation of everything appellant contends the statement "all of the issues arising out of the contract were properly before the Court without reference to the question whether either party had breached the contract." Such a statement by the appellee in view of this pleadings and his brief is somewhat surprising. It was appellee who labelled this action one for breach of contract. A scan of his complaint reveals an almost complete predication of the action on breach as allegedly committed by the appellant. Appellant wishes to reiterate his position; that is, that the contract was not operative. Appellee brought up this question of breach. It is not for him now to make a denial of this issue. His statement "the entire contract was before the court" does not cure any of the difficulties that the appellee encounters on this point.

The appellant most definitely does not dispute the contract. What he does do is point to the conditions of the contract and say that since they went unfulfilled there was no breach and therefore no cause of action.

Appellee may say all he wants about the entire contract being in dispute, but he cannot thereby escape the applicable law. That is: when the conditions of a contract sale are unperformed there is no liability on either side to consummate the sale. There being no liability, there can be no breach, and there being no breach there can be no suit under the contract. *Tatum v. Ackerman,* 83 P. 151, 153, 148 C. 357.

Therefore, the appellee had to prove a breach as well as performance of conditions to recover on the contract.

III. THE COURT IMPROPERLY REFUSED DISMISSAL ON GROUNDS OF PREMATURITY.

Appellee has utilized several pages to indicate that the conditions precedent to performance of the contract or any suit thereon had been met in that (a) there was a joint audit, and (b) there was a proper reconciliation.

Appellant has previously shown in his opening brief why a joint audit did not occur. As to the purported reconciliation by Mr. Wiseman, appellee seems to have misread appellant's opening brief. Appellant reiterates and agrees with the contentions set out on page 13 "We should like to call the Court's attention to Mr. Wiseman's testimony at page 178 of the record where he testified that he was directed by the parties not to go back to the books of the corporation but to limit himself to reconciling the differences in the two audits." This clearly was Mr. Wiseman's duty. How

can it be said, when Mr. Viray's audit was $79,601.91 and Mr. Kaneshiro's audit was $121,228.67, that the final result of $155,625.95, was a reconciliation? It is submitted that under no circumstances can this be called "a reconciliation", by any ordinary usage of such term. Accordingly, there was no meeting of conditions precedent and the action should have been dismissed.

IV. APPELLANT'S ANSWER TO APPELLEE'S CONTENTIONS ON FINDINGS.

The foregoing emphasized the fact that the questions of performance of conditions in breach are of the essence of the appellee's suit. Therefore, findings thereon are essential to the validity of the trial Court's judgment for the appellee.

Kweskin v. Finkelstein, 223 F. 2d 677;
Maher v. Henrickson, 188 F. 2d 700;
Irish v. United States, 225 F. 2d 3.

The appellee suggests that the findings of the trial Court are sufficient. But, it is so only if the heart of appellee's complaint is cut out and the essentials of the contract, suit and judgment are disregarded.

The appellant himself shows the impelling need for those findings. First he sues for breach. Then he says breach need not be proved. If the appellee cannot glean from the record on what the judgment should be properly predicated, he cannot say that the rule of waiver of minor defects in *Hurwitz v. Hurwitz,*

136 F. 2d 736, is applicable. If the record be not clear to him, it cannot be clear to anyone else. Therefore the rule in *Shapiro v. Paloma*, 136 F. 2d 656, 667, must apply and the failure to make such findings constitutes reversible error.

V. APPELLANT'S ANSWER TO APPELLEE'S ARGUMENT ON COSTS.

The appellee has made his position hereon untenable: that is, that the appellee was the prevailing party. Appellee has said that breach need not have been shown. The trial Court made no finding on legal duty thereby eliminating from the judgment the idea of breach.

This automatically takes the appellee out of the definition he quotes from *Lawlor v. Metten*, 100 P. 2d 937, and proves that appellant was not the cause of the necessity of having the Court determine the actual value of the shares and awarding costs as damages against appellant. If there was any issue before the trial Court, it was there by reason of the contract provisions for reconciliation of differences by the Court, and under such circumstances each party must bear his own costs.

CONCLUSION.

For the reasons above stated it is respectfully submitted that judgment appealed from should be reversed.

Dated, San Francisco, California,
November 19, 1956.

Respectfully submitted,
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Attorneys for Appellant.